Dato' Hj Shahari bin Hj Hassan v Hj Shamsudin bin Talib & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N-01-249 OF 1996
LAMIN PCA, AHMAD FAIRUZ AND MOKHTAR SIDIN JJCA
3 JULY 1998

Constitutional Law *— Suit involving government or ruler — Dato' Shahbandar of Sungai Ujong — Removal of — Whether removal was an issue involving customary law and could only be decided by Dewan Keadilan dan Undang — Whether jurisdiction of court is excluded on matters pertaining to Malay custom in Negeri Sembilan — Negeri Sembilan State Constitution art XVI*

The appellant was Dato' Shahbandar luak Sungai Ujong, Negeri Sembilan. He was removed from his position by the Dewan Keadilan dan Undang ('the Dewan') following a memorandum sent by the respondents to the Dewan alleging misdeeds committed by the appellant. The appellant filed a writ and a statement of claim against the respondents. The respondents applied to strike out the appellant's writ and statement of claim under O 18 r 19(b) of the Rules of the High Court 1980. It was submitted that the appellant had no right to challenge the decision of the Dewan in respect of the appellant's removal as Dato' Shahbandar of Sungai Ujong in court because the removal of the appellant was an issue involving the customary law of Sungai Ujong and that issue could only be decided by the Dewan. For that reason the court has no jurisdiction to decide on the issue by virtue of art XVI of the State Constitution. The High Court allowed the respondents' application stating that it was bound by the decision in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* ('*Dato Menteri Othman*') to hold that the court had no jurisdiction to adjudicate on the issues raised by the appellant. The appellant appealed. It was argued, inter alia, that in *Dato Menteri Othman*, the issue was on the appointment of the Undang who was one of the Ruling Chiefs of Negeri Sembilan. It was submitted that Dato' Shahbandar is not a Ruling Chief and *Dato Menteri Othman* was not applicable.

Held, dismissing the appeal:

(1) (Per **Lamin PCA**) In Negeri Sembilan rightly it is the Dewan which has the final authority to decide on any issue relating to Malay custom in any part of the state. Therefore, the election to the office of Dato' Shahbandar comes within the ambit of the Adat for it is in accordance with the custom of luak of Sungai Ujong and certainly it is an issue relating to Malay custom. The decision of the Dewan must be respected as being the final arbiter on all issues referred to it as only those belonging to or coming within the jurisdiction of the Adat and properly elected leaders may administer the Adat.

Furthermore, if the writ and the statement of claim had not been struck out and the case went for trial, then the normal court proceedings will take place. This may entail examinations and cross examinations of elders and the respectable members of the Dewan and this if without proper control may adversely affect the dignity of the Dewan as a whole. The very nature of the proceedings is foreign to problem-solving in the Adat system which is conducted by way of discussions and examinations of issues at the first instance. The Adat never envisaged that its proceedings be supervised or corrected by another body (the court) which has no knowledge of its workings. This is justice within the Adat and not justice within the law.

Therefore, the civil court shall not interfere in matters pertaining to the Adat. In any dispute in matters of the Adat, the Dewan shall be the correct and the proper body to be the final arbiter and not the civil court (see pp 711D–E, H, 712F–G, H–I and 713A).

(2) (Per **Mokhtar Sidin JCA**) The issue in *Dato Menteri Othman* arose from art XVI of the State Constitution then. The decision in *Dato Menteri Othman* was that the court should decline jurisdiction where the issues are matters pertaining to the customary law of that State, in particular matters as contained in art XVI of the State Constitution where the Dewan is the best avenue to settle and decide on the issues. As such, the appellant was not correct when he said that the decision is only applicable to succession of the Ruler and the Ruling Chiefs (see pp 716D and 719C); *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 followed.

(3) (Per **Mokhtar Sidin JCA**) It is clear that the election or succession to or removal from or vacation of office of Dato' Shahbandar of Sungai Ujong should be done in accordance with the Malay custom (adat) of Negeri Sembilan in particular the Malay custom of Sungai Ujong. Any question or issue arising from that as decided by *Dato Menteri Othman* should be referred to the Dewan (see p 719F).

(4) (Per **Mokhtar Sidin JCA**) Although the appellant was only a chieftain in Sungai Ujong, for historical reasons, his status as chieftain was raised to that almost of a Ruling Chief. The election or succession to or removal from or vacation of office is similar to that of an Undang except it is done amongst smaller groups of people. Therefore, even assuming that the appellant's submission was correct, *Dato Menteri Othman* was still applicable (see p 720A–C).

(5) (Per **Mokhtar Sidin JCA**) Article XVI of the State Constitution was amended after the decision of *Dato Menteri Othman* to give effect to the decision. The amendments made it clear what are the matters to be brought before the Dewan and the jurisdiction of the court has to be excluded on those matters. With this provision, it is clear that any matter pertaining to the Malay custom in Negeri Sembilan is within the jurisdiction of the

Dewan and the court has no jurisdiction to entertain it since its jurisdiction has been ousted by express words of the State Constitution. It is clear that the removal of Dato' Shahbandar is one of the customs. As such it is clear that under the State Constitution the court has no jurisdiction to entertain the writ and the statement of claim filed by the appellant. The learned trial judge was right in striking out the appellant's writ and statement of claim (see p 720G–I).

[**Bahasa Malaysia summary**

Perayu adalah Dato' Shahbandar luak Sungai Ujong, Negeri Sembilan. Beliau dipecat daripada kedudukannya oleh Dewan Keadilan dan Undang ('Dewan') ekoran daripada memorandum yang dihantar oleh penentang-penentang kepada Dewan yang mengatakan salah-laku perayu. Perayu memfailkan writ dan pernyataan tuntutan terhadap penentang-penentang. Penentang-penentang memohon untuk membatalkan writ dan pernyataan tuntutan perayu di bawah A 18 k 19(b) Kaedah-Kaedah Mahkamah Tinggi 1980. Adalah dihujahkan bahawa perayu tidak mempunyai hak untuk mencabar keputusan Dewan berkenaan dengan pemecatan perayu sebagai Dato' Shahbandar Sungai Ujong di mahkamah kerana pemecatan perayu adalah satu isu yang melibatkan undang-undang adat Sungai Ujong dan isu itu hanya boleh diputuskan oleh Dewan. Oleh sebab itu mahkamah tidak mempunyai bidang kuasa untuk membuat keputusan atas isu itu memandangkan perkara XVI Perlembagaan Negeri. Mahkamah Tinggi membenarkan permohonan penentang-penentang dan menyatakan bahawa ia terikat dengan keputusan dalam kes *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* ('*Dato Menteri Othman*') untuk memutuskan bahawa mahkamah tidak mempunyai bidang kuasa untuk menghakimi atas isu-isu yang ditimbulkan oleh perayu. Perayu membuat rayuan. Adalah dihujahkan, antara lain, bahawa dalam kes *Dato Menteri Othman*, isu adalah berkenaan dengan pelantikan Undang yang merupakan salah seorang daripada Ketua-Ketua Pemerintah Negeri Sembilan. Adalah dihujahkan bahawa Dato' Shahbandar bukannya Ketua Pemerintah dan *Dato Menteri Othman* tidak terpakai.

Diputuskan, menolak rayuan:

(1) (Oleh **Lamin PMR**) Di Negeri Sembilan, Dewan mempunyai kuasa muktamad untuk menentukan apa-apa isu berkaitan dengan adat Melayu di mana-mana bahagian negeri itu. Oleh itu, pelantikan Dato' Shahbandar berada dalam lingkungan adat kerana ia adalah mengikut adat luak Sungai Ujong dan pastinya satu isu berkaitan dengan adat Melayu. Keputusan Dewan mesti dihormati sebagai pemutus muktamad atas semua isu yang dirujukkan kepadanya kerana hanya mereka yang datang dari bidang kuasa adat itu dan ketua-ketua yang dilantik sewajarnya boleh menguruskan adat itu.

Tambahan pula, jika writ dan pernyataan tuntutan tidak dibatalkan dan kes itu dibicarakan, prosiding mahkamah yang biasa akan berlangsung. Ini memerlukan pemeriksaan dan pemeriksaan balas ahli-ahli Dewan yang dihormati dan ini, tanpa kawalan yang wajar, boleh memberikan kesan yang tidak baik kepada martabat Dewan keseluruhannya. Bentuk prosiding adalah asing kepada penyelesaian masalah dalam sistem adat yang dijalankan dengan cara perbincangan dan pemeriksaan isu-isu di peringkat pertama. Adat itu tidak pernah membayangkan bahawa prosidingnya diawasi atau dibetulkan oleh badan lain (mahkamah) yang tidak mempunyai pengetahuan tentang pelaksanaannya. Ini adalah keadilan dalam adat bukannya keadilan dalam undang-undang.

Oleh itu, mahkamah sivil tidak patut campur tangan dalam perkara-perkara yang berkaitan dengan adat. Dalam apa-apa pertikaian berkaitan dengan adat, Dewan adalah badan yang betul dan sesuai untuk menjadi pemutus muktamad dan bukannya mahkamah sivil (lihat ms 711D–E, H, 712F–G, H–I dan 713A).

(2) (Oleh **Mokhtar Sidin HMR**) Isu dalam *Dato Menteri Othman* timbul daripada perkara XVI Perlembagaan Negeri pada ketika itu. Keputusan dalam *Dato Menteri Othman* adalah bahawa mahkamah patut menolak bidang kuasa di mana isu-isu adalah perkara-perkara berkaitan dengan undang-undang adat negeri itu, terutamanya perkara-perkara seperti yang terkandung dalam perkara XVI Perlembagaan Negeri di mana Dewan adalah tempat yang paling sesuai untuk menyelesai dan memberi keputusan atas isu-isu itu. Oleh yang demikian, perayu adalah salah apabila dia mengatakan bahawa keputusan itu hanyalah terpakai untuk pewarisan Pemerintah dan Ketua-Ketua Pemerintah (lihat ms 716D dan 719C); *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 diikut.

(3) (Oleh **Mokhtar Sidin HMR**) Adalah jelas bahawa pemilihan atau pewarisan atau pemecatan Dato' Shahbandar Sungai Ujong patut dilakukan mengikut adat Melayu Negeri Sembilan terutamanya adat Melayu Sungai Ujong. Apa-apa persoalan atau isu yang timbul daripadanya seperti yang diputuskan oleh *Dato Menteri Othman* patut dirujuk kepada Dewan (lihat ms 719F).

(4) (Oleh **Mokhtar Sidin HMR**) Walaupun perayu hanya ketua suku kaum di Sungai Ujong, kerana sebab-sebab sejarah, statusnya sebagai ketua suku kaum diangkat hampir sama seperti Ketua Pemerintah. Pemilihan atau pewarisan atau pemecatannya adalah sama seperti Undang kecuali ianya dibuat di antara kumpulan yang lebih kecil. Oleh itu, walaupun dianggap hujah perayu adalah betul, *Dato Menteri Othman* masih terpakai (lihat ms 720A–C).

(5) (Oleh **Mokhtar Sidin HMR**) Perkara XVI Perlembagaan Negeri telah dipinda selepas keputusan *Dato Menteri Othman* untuk memberi kesan kepada keputusan itu. Pindaan itu menjelaskan perkara apa yang patut dibawa di hadapan Dewan dan bidang kuasa mahkamah mesti dikecualikan atas perkara-perkara itu.

Dengan peruntukan ini, adalah jelas bahawa apa-apa perkara berkaitan dengan adat Melayu di Negeri Sembilan adalah dalam bidang kuasa Dewan dan mahkamah tidak mempunyai bidang kuasa melayannya kerana bidang kuasanya telah disingkirkan oleh perkataan-perkataan nyata Perlembagaan Negeri itu. Adalah jelas bahawa pemecatan Dato' Shahbandar adalah salah satu daripada adat itu. Oleh yang demikian adalah jelas bahawa di bawah Perlembagaan Negeri mahkamah tidak mempunyai bidang kuasa untuk melayan writ dan pernyataan tuntutan yang difailkan oleh perayu. Hakim perbicaraan yang bijaksana adalah betul dalam membatalkan writ dan pernyataan tuntutan perayu (lihat ms 720G–I).]

Notes

For cases on suit involving government or ruler, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1516–1521.

Case referred to

Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 (folld)

Legislation referred to

Federal Constitution arts 71(1), (2), 121(1A)
Rules of the High Court 1980 O 18 r 19
State Constitution (Negeri Sembilan) arts XV, XVI, XXXII, Cap XV

Appeal from: Civil Suit No 22–138 of 1994 (High Court, Seremban)

Salleh Abas (*Megat Suffian Merican* with him) (*Salleh Abbas, Yaacob & Sofiah*) for the appellant.

Zamani Ibrahim (*Mohd Fozi Md Zain* with him) (*Ruslan & Zamani*) for the first to sixth respondents.

Mary Lim (Legal Adviser, Negeri Sembilan) for the seventh respondent.

Cur Adv Vult

Lamin PCA: This is an appeal against the decision of the learned judge of the High Court of Seremban who allowed the application of the first to sixth defendants/respondents to strike out the writ and the amended statement of claim of the plaintiff under O 18 r 19 of the Rules of the High Court 1980. The learned judge in his grounds of judgment dealt with a number of issues including that of natural justice. He finally decided in favour of the defendants/respondents (the applicants) on the ground that the court had no jurisdiction to hear the appellants' claim as he was bound by the Federal Court's decision in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.

In *Dato Menteri Othman*'s case, the Federal Court by a majority decision (4–1) decided that the appeal must be allowed for the reason that the civil court had no jurisdiction or must decline to exercise jurisdiction on the matter of the election of the 15th Undang of Jelebu, Negeri Sembilan. Raja Azlan Shah Ag LP (as he then was) in the opening statement of his judgment said (at p 31):

> We have been entrusted with a grave and delicate issue — whether or not to issue a declaration that the purported election of the 15th Undang of Jelebu is ultra vires adat laws and constitution of Luak of Jelebu

and he recognized that (at p 32):

> Election of Undangs has since time immemorial been made in accordance with the ancient customary laws of their respective luaks.

He concluded that (at p 33):

> ... the Dewan is a far more suitable forum for discharging that function than a panel of five judges. It is open to the courts in this country to refuse a remedy on the ground that it is forum non conveniens. This doctrine is that a court may decline to exercise jurisdiction on the ground that another body would be more appropriate.

Salleh Abas FJ (as he then was) concluded that the court of law has no jurisdiction to try the dispute and he said (at p 34):

> ... the Dewan has the authority to make the determination, the advice so expressed should bring the matter to an end.

In the words of Ibrahim Manan FJ (as he then was) (at p 36):

> ... that the Dewan is intended to be the sole authority to determine and advise on the dispute.

Hashim Yeop A Sani J (as he then was) has this to say (at pp 36–37):

> In the context of the Negeri Sembilan Constitution the Dewan Keadilan must surely be regarded as the custodian of the adat in Negeri Sembilan. The constitution of the members of the Dewan Keadilan would indicate this very intention. The advice of the Dewan Keadilan in the matter of adat must therefore be regarded as binding and conclusive for otherwise there would be uncertainty.

And he concluded:

> It necessarily follows that to enlarge the jurisdiction of the court to include adjudication on such matters as succession of a Ruling Chief would likewise to my mind be ultra vires art 71 [of the Federal Constitution].

Suffian LP (as he then was) delivering his dissenting judgment was more concerned with the effect of the ouster clause in both the Federal and State Constitutions and as he found that it has not been done 'in clear language' therefore the civil court has jurisdiction to adjudicate on the dispute. He was not, as it were, rushing to adjudicate. He has his anxiety for he said (at p 39):

> Whether or not the Undang has been validly elected is of course a delicate question, and a political question which is best solved by political means; but if the constitution and law require, as I think they do, that the matter be resolved by the court, then until the constitution has been suitably amended, the court has no alternative but to embark on the task as best as it can, though that will have the unfortunate effect of throwing the court into the political arena. So that courts are not turned into a political forum, I would rather that State constitutions be amended by the appropriate authorities, so that future disputes regarding succession are kept out of our way and decided by persons or bodies better equipped to do so.

Like any other Ruling Chief in Negeri Sembilan, a person assumes the office of Dato' Shahbandar of Sungai Ujong by way of an election and in the words of art XV(1) he shall be a person 'Lawfully elected ... *in accordance with the custom* of the luak of Sungai Ujong.

In Negeri Sembilan rightly it is the Dewan which has the final authority to decide on any issue 'relating to Malay Custom in any part of the State including questions relating to the election or succession ... of office of any of the Ruling Chiefs or on other matters ...' (art XVI(1)).

So the election to the office of Dato' Shahbandar comes within the ambit of the Adat for it is 'in accordance with the custom of the luak of Sungai Ujong' and certainly it is an issue 'relating to Malay Custom' and in the instant case it is a custom of the luak of Sungai Ujong, a part of Negeri Sembilan. Conversely therefore anything done not in accordance with the Adat must necessarily result in the decision being 'tidak sah' (not valid).

In the memorandum submitted by anak-anak waris di-Air luak Sungai Ujong, Dato' Shahbandar — the appellant — was accused of 'tidak amanah dan jujur menjalankan tugas-tugasnya sehingga aturan adat dan pusaka menjadi kucar-kacir, kuncang kecoh dan kusut masai' and the memorandum cited a series of incidents for example acts of maladministration such as appointments and dismissals not done according to the Adat or contrary to the decisions of the Dewan and therefore not valid. Many more incidents of improper conduct were related. On those grounds, the memorandum contended that the appellant was not qualified to hold the post of Dato' Shahbandar. I do not propose to mention the invitation extended to the appellant to attend the kerapatan on two occasions and his refusal to attend and his written representation as they have been dealt with by my learned brother judge Mokhtar Sidin JCA.

The decision otherwise referred to as the 'advise' of the Dewan must be respected as being the final arbiter on all issues referred to it. Only those belonging to or coming within the jurisdiction of the Adat and properly elected leaders may administer the Adat. It is therefore implicit that those who are not of the Adat Perpateh may not sit in judgment of their fellow Adat followers. If I may liken this to a situation relating to the administration of Islamic law. Only qualified Muslims sit in a Syariah court. Rightly the civil court has divorced itself from the Syariah courts (art 121(1A) of the Federal Constitution). Clause (1A) of art 121 of the Federal Constitution reads:

> The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

The real intent of this clause in my view is to make it clear that no civil court shall deal with any matter pertaining to Islam. It is only proper that it is so because the civil courts are manned by judges of various races and religions and all of them have had their education in civil law and rightly therefore they cannot assume competency in Islamic law. In similar vein there is a case to be argued in favour of the proposition that the Adat Perpateh shall only be administered by those professing the said customary law. The Adat is jealously guarded and that explains why Negeri Sembilan is singularly different from the other states so that the practice of the Adat is spelt out in the State Constitution which makes reference to 'ancient constitution and ancient custom ... shall continue as heretofore.' (art XXXII); hence the familiar expression 'Biar Mati Anak Jangan Mati Adat' and it is often repeated as a reminder for any breach of the Adat. The Adat is not spelt out anywhere in the State Constitution of Negeri Sembilan. For example in regard to the problem of election to office, it is merely expressed as to be 'in accordance with the custom of the luak' concerned. In *Dato Menteri Othman*'s case, the court was in fact unanimous in its view that the Dewan was a more appropriate body to deal with such a dispute for it is better equipped in the sense that the Dewan is learned in the Adat and not the civil court. The dissent in that case was only in regard to the effect of the ouster clause. There can be another reason in support of the proposition that the civil court shall not interfere in matters pertaining to the Adat. The civil court in our country is the brainchild of the English common law practicing the adversary system with which we have found ourselves very comfortable and a divorce from it is unthinkable. That does not mean that it can assume jurisdiction supervisory or otherwise in matters of the Adat. If the writ and the amended statement of claim had not been struck out and the case went for trial, then the normal court proceedings will take place meaning that the adversarial system will play its role with full force and effect. This may entail examinations and cross examinations of elders not to mention the respectable members of the Dewan and this if without proper control may adversely affect the dignity of the Dewan as a whole. The very nature of the proceedings is foreign to problem solving in the Adat system which is conducted by way of discussions and examinations of issues at the first instance such as at a 'kerapatan waris' and then followed at a 'kerapatan luak' and in the present case their unanimous decisions were formulated in a memorandum and forwarded to the sixth respondent for presentation to the Dewan for final determination. The Adat never envisaged that its proceedings be supervised or corrected by another body (the court) which has no knowledge of its workings. This is justice within the Adat and not justice within the law. Also there are still arguments and differences between us, judges in the civil court as to whether declaration or certiorari for example is the appropriate remedy in particular cases in order to attain procedural justice. To think of wandering into other people's homes, I think we should restrain ourselves.

A For the reasons that I have just discussed I am of the view that in any dispute in matters of the Adat, the Dewan shall be the correct and the proper body to be the final arbiter and not the civil court. The integrity and competency of the Dewan must be respected. Any attempt to approach the civil court for a final solution through its supervisory jurisdiction in matters of the Adat must be taken as an affront to the Dewan.

B

There is the other issue and that is whether there has been compliance with the rules of natural justice in the present case. I do not think that it is necessary or even proper for me to enter into a discussion as to whether rules of natural justice as understood in the civil law have been complied or not by the Dewan in view of my finding that the Adat is the preserve of

C the Dewan. My learned brother Mokhtar Sidin JCA has however made some observations on it and I go along with him. However I must not fail to lay emphasis here that His Royal Highness, the Yang di-Pertuan Besar presides at every sitting of the Dewan unless he is for some reason indisposed. Every Luak is represented by its Ruling Chief and all of them

D must be presumed to be well versed in the Adat. Accordingly, I have no doubt in my own mind as to the justice of the case when it is placed before the Dewan for its determination because it will be decided in the best traditions of the Adat Perpateh.

I have had the opportunity of going through the draft judgments of my

E learned brother Mokhtar Sidin JCA and I entirely agree with his reasoning and conclusion.

In the circumstances, the appeal must be dismissed with costs. The deposit shall be paid to the respondents towards taxed costs.

F **Ahmad Fairuz JCA**: I have had the advantage of reading the draft judgments of my learned brothers, Lamin PCA and Mokhtar Sidin JCA, and I respectfully agree, for the reasons given in both judgments, that the appeal must be dismissed with costs. I also agree that the deposit be paid to the respondents towards taxed costs.

G **Mokhtar Sidin JCA**: We have reserved our decision in respect of this appeal. I now give my decision and my reasons.

To understand the appeal in its proper perspective, it is better for me to set out the facts of the case leading to the appeal. The appellant/plaintiff was the Dato' Shahbandar Luak Sungai Ujong and at that material time

H was also the head of the Adat Waris di Air Luak Sungai Ujong ('Waris di Air'). The first to fifth respondents at the material time were members of Waris di Air. The sixth respondent at the material time was the Undang of Sungai Ujong (and at the time when this appeal was heard is still the Undang of Sungai Ujong). The seventh respondent is the State Government of Negeri Sembilan Darul Khusus. Though there were other defendants

I being named in the court below, for reasons best known to the appellant there were no appeals against them.

The appellant was appointed the Dato' Shahbandar some time in 1983. At the time of his appointment, the Undang of Sungai Ujong was

not the sixth respondent but his predecessor. According to the statement of defence of the first to fifth respondents, on or around 24 July 1994 there was a gathering of Waris di Air (satu kerapatan waris-waris) attended among others by the elders of the four tribes of Waris di Air (ibu-ibu soko yang tertua dan waris-waris yang tertua dari keempat-empat perut Waris di Air). At that gathering a resolution was passed against the appellant whereby the Waris di Air voted that it had no confidence in the appellant holding the post of Dato' Shahbandar and he should be removed from that office. The statement of defence also stated that at that time the post of Dato' Panglima Besar Balai Adat Waris di Air was the first respondent. It was also decided at that gathering that the resolution be forwarded to the Dato' Undang of Sungai Ujong (the sixth respondent) who was and is the Ruling Chief of Sungai Ujong.

As a result of that a memorandum was prepared and signed by the first respondent and that memorandum was presented to the sixth respondent in accordance with the customary law of Sungai Ujong. The memorandum which was prepared by the elders of Waris di Air spelt out the wrong-doings, misdeeds and misbehaviours committed by the appellant in particular the appellant's letter dated 11 July 1994 to the Yang di-Pertuan Besar of Negeri Sembilan whereby he questioned the appointment of the sixth respondent as the Undang of Sungai Ujong which the appellant claimed to be not in accordance with the customary law of Sungai Ujong and the awards made by the Yang di-Pertuan Besar to certain individuals. Another gathering was held on 13 August 1994 whereby the memorandum was presented to the sixth respondent and the elders of the Waris di Air requested the removal of the appellant as the Dato' Shahbandar of Sungai Ujong.

The statement of defence of the first to the fifth respondents also stated the prerogative of removing the appellant as Dato' Shahbandar of Sungai Ujong belonged to the elders of the Waris di Air. Subsequent to that the Dewan Keadilan dan Undang ('the Dewan') removed the appellant as the Dato' Shahbandar of Sungai Ujong.

The sixth respondent in his statement of defence stated that he was not involved in the removal of the appellant as the Dato' Shahbandar of Sungai Ujong nor was he a party to the removal. He stated further the appointment and the removal of the Dato' Shahbandar of Sungai Ujong is governed by art XV of the State Constitution and not within his powers to do so. The appointment and removal must be in accordance with the customary law of Sungai Ujong. As such the removal was properly done and in order. In his defence he stated that on receiving the memorandum from the elders, the sixth respondent then referred the matter to the Dewan and also informed the seventh respondent. The Dewan then made a decision to remove the appellant as the Dato' Shahbandar of Sungai Ujong. As a result of that decision the appellant was formally removed as the Dato' Shahbandar of Sungai Ujong and the seventh respondent stopped all payments of allowances and other perks of Dato' Shahbandar of Sungai Ujong to the appellant.

The seventh respondent in its statement of defence denied that it was involved in the resolution passed and was instrumental in the planning to remove the appellant as the Dato' Shahbandar of Sungai Ujong. The seventh respondent also denied that it was involved in the gathering organized by the first to fifth respondents when the resolution to remove the appellant as the Dato' Shahbandar was adopted. The seventh respondent further stated the decision to remove the appellant as the Dato' Shahbandar of Sungai Ujong was by the Dewan and that decision was conveyed to it. The seventh respondent on being informed of the removal, stopped all payments in respect of allowances and perks to the appellant from 1 November 1994. A letter dated 6 October 1994 was sent by the seventh respondent to the appellant informing him of this.

After the statements of defence of the first to seventh respondents were filed, the first to sixth respondents took out summons in chambers under O 18 r 19(b) and (d) of the Rules of the High Court to strike out the appellant's writ of summons and the statement of claim on the ground that the statement of claim was scandalous, frivolous or vexatious and an abuse of the process of the court. In the affidavit in support of the application, the sixth respondent deposed that the appellant has no right to challenge the decision of the Dewan in respect of the appellant's removal as Dato' Shahbandar of Sungai Ujong in court. The sixth respondent further stated that the removal of the appellant as Dato' Shahbandar of Sungai Ujong was an issue involving the customary law of Sungai Ujong and that issue could only be decided by the Dewan. For that reason the court has no jurisdiction to decide on the issue by virtue of art XVI of the State Constitution.

At the High Court, the learned trial judge allowed the application by the six respondents and struck off the appellant's writ of summons and the statement of claim. Being dissatisfied with the decision of the learned trial judge, the appellant now appealed to us. In his judgment, the learned trial judge said that he was bound by the majority decision of the Federal Court in the case of *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 ('the *Dato Menteri Othman*'s case'). Because of that decision the learned trial judge held that the court has no jurisdiction to adjudicate on the issues raised by the appellant in the present appeal.

Tun Mohd Salleh bin Abas appeared before us as counsel for the appellant. Incidentally he was one of the judges who gave judgment in the *Dato Menteri Othman*'s case and formed the majority. He submitted before us that the court is not excluded from hearing the appellant's statement of claim and as such the learned trial judge had erred in his decision. He went on to say that the *Dato Menteri Othman*'s case is not applicable because the present appeal could be distinguished from that case. He submitted further that in the *Dato Menteri Othman*'s case the issue was on the appointment of the Undang who was one of the Ruling Chiefs of Negeri Sembilan. Article 71(1) and (2) of the Federal Constitution guaranteed the State Authority (the Dewan) the right to determine any dispute in respect of succession as a Ruler or as a Ruling Chief. Article 71(1) and (2) of the Federal Constitution provides:

(1) The Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of the State in accordance with the Constitution of that State; but any dispute as to the title to the succession as Ruler of any State shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State.

(2) Clause (1) shall, with the necessary modifications, apply in relation to a Ruling Chief of Negeri Sembilan as it applies to the Ruler of a State.

Counsel submitted that the Dato' Shahbandar is not a Ruling Chief and as such the protection of art 71(1) and (2) of the Federal Constitution is not available to him. In view of that it was submitted that the *Dato Menteri Othman*'s case is not applicable and the court has jurisdiction to hear the writ.

With the greatest respect to the learned counsel I beg to differ. It is clear to me that the issue in that case arose from art XVI of the State Constitution then. It is to be noted that art XVI of the State Constitution was amended after the decision of the *Dato Menteri Othman*'s case. Before the amendment, art XVI of the State Constitution reads:

> There shall be a Dewan Keadilan dan Undang to be called in English 'The Council of the Yang di-Pertuan Besar and the Ruling Chiefs' hereinafter referred to as the Dewan to advise on questions relating to Malay Custom in any part of the State or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs and to exercise such functions as may be conferred upon it by this Constitution or any other written law.

It appears to me that art XVI of the State Constitution was a simple one clause article and there was no exclusion clause at all. There was also no mention of the election, succession or removal from or vacation of office of the Ruling Chiefs. It only referred to question relating to Malay custom or any matter reported to by His Highness and the Ruling Chiefs. To understand the majority decision of the Federal Court in the *Dato Menteri Othman*'s case, I have to look at the judgment carefully. In that case it was held that:

(1) the Dewan Keadilan dan Undang is given power under the Constitution to advise on matters relating to Malay custom and as the Dewan in this case had blessed the appointment of the second defendant as the Undang of Jelebu, the court should not attempt to usurp the function of the Dewan, which is a more suitable forum for discharging that function; and

(2) the court should decline jurisdiction on the ground that it is forum non conveniens and that there is another body which is more appropriate and which has been given power under the Constitution of the State to decide the matter.

It is clear to me especially in regard to what has been held by the Federal Court matters in respect of Malay custom or other matters which may be referred to it by His Highness and the Ruling Chiefs in that under art XVI of the State Constitution should be decided by the Dewan and the court should decline jurisdiction. Salleh Abas FJ (as he then was) at pp 33–34 said:

Article 71(1) of the Federal Constitution makes provision that whilst the 'Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State,' the Federation, however, has to adopt a policy of non-interference and strict neutrality as regards a dispute as to the title or right of a particular individual to succeed as Ruler. This principle of strict neutrality is clearly stated in the second limb of art 71(1) as follows:

> 'but any dispute as to the title to the succession as Ruler of any State, shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State'.

There can be no doubt that this principle is also applicable to a dispute relating to the appointment of an Undang because cl (2) of this article provides that:

> 'Clause (1) shall, with the necessary modifications, apply in relation to a Ruling Chief of Negeri Sembilan as it applies to the Ruler of State.'

The State Constitution of Negeri Sembilan recognizes the continued application of the ancient constitution and ancient custom of the State so long as they are not inconsistent with the State Constitution (art XXXII). Part of the ancient constitution and ancient custom is the concept of rulership. There exist five Ruling Chiefs (art XIV) in addition to the royal personage styled as Yang di-Pertuan Besar of the State, and not as Sultan like the royal personage in other states (art VII). The Ruling Chiefs are the Undangs of Sungai Ujong, Jelebu, Johol and Rembau and Tengku Besar of Tampin (art XIV). The rulership in Negeri Sembilan State Constitution unlike that in other states is a composite concept, consisting of His Highness the Yang di-Pertuan Besar and the five Ruling Chiefs (Article XXVIII). For the exercise of functions under the State Constitution, His Highness the Yang di-Pertuan Besar and at least three of the four Undangs must act (art XXVIII(2)), but for the exercise of functions under the Federal Constitution only the Yang di-Pertuan Besar is required to perform them, although in performing those functions, His Highness is regarded as acting not only on his own behalf but also on behalf of the Ruling Chiefs as well (art 160(2)). The reason why the Undangs are not required to perform the functions under the Federal Constitution must have understandably been due to the question of convenience. Because the definition of ruler is a composite one, the Constitution of the State itself was declared and ordained by His Highness together with the Ruling Chiefs (see preamble to the Constitution of Negeri Sembilan). His Highness the Yang di-Pertuan Besar is elected by the four Undangs (art VII), whilst the Undangs themselves have to be elected in accordance with the custom of their respective territories (luaks) (art XIV(1)). His Highness and the Ruling Chiefs and a few other persons are members of a Council known as the Dewan Keadilan dan Undang, in short 'the Dewan' (arts XVI and XVII). The main function of the Dewan is 'to advise on questions relating to Malay Custom in any part of the states or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs.

The Dewan is the culmination of the lengthy political and constitutional developments of the State. It is the embodiment of traditional elements and values which are kept alive by the Constitution. It is a machinery to rationalize these elements so as to make them work under a modern democratic constitution. Until the present Constitution was promulgated in 1959,

Negeri Sembilan had no written constitution. Her constitutional law, however, could only be found in the various treaties entered into by the Yang di-Pertuan Besar, the Undangs and the British Government. Besides these treaties, customary laws were allowed to continue side by side to govern the political, social and economic life in the respective territories so long as they did not become a hindrance to the British policy. Indeed Negeri Sembilan itself was only constituted as a State by the treaty of 13 July 1889, whereby the parties concerned agreed to form 'a Confederation of States to be known as the Negeri Sembilan.' In 1895, this Confederated State joined the Federation of Protected Malay States of Perak, Selangor, Negeri Sembilan and Pahang. The formation of Malayan Union in 1946 and its subsequent transformation into the Federation of Malaya in 1948 did not give Negeri Sembilan a separate written constitution. It was only independence in 1957 which finally gave her the present Constitution promulgated in 1959. Under this Constitution the ancient constitution and custom are preserved, 'except as expressed herein', and 'where not inconsistent with' the Constitution. *To rationalize and make this ancient constitution and custom work and to avoid disputes which could arise from many divergent interpretations of this ancient constitution and ancient custom, the Dewan is established with power 'to advise on questions relating to Malay custom in any part of the State or other matters which may be referred to it by His Highness or any of the Ruling Chiefs'. The expression 'to advise on' in my judgment is not merely confined to the ascertainment and statement of customary law in an abstract and generalized way like a statute or an enactment. Neither is the expression restricted to mean only 'to give an opinion'. The expression 'to advise on' must in my judgment be the ascertainment and the application of law on a given subject to a particular set of facts. The advice so expressed by the Dewan, irrespective of the language used by the clerk of the Dewan to record it, whether 'giving its blessing or approval' or some other words clearly indicates the thinking and view of the Dewan and such opinion, since it comes from the highest and august body should be worthy of respect and obedience. It should not be ignored. There is no need for a provision in the Constitution saying that the advice is binding. Customary law, after all, is based on the recognition and acceptance that a rule is binding, otherwise inconveniences and crisis would follow from disobedience thereto. What higher and better authority deserves and commands respect in the interpretation and explanation of customary law on this particular topic than the Dewan itself which consists of the Ruler of the States and other prominent persons? As an example of an advice being binding, is the advice pronounced by the Federal Court under art 130 of the Federal Constitution when it exercises its advisory jurisdiction on a question referred to the court by the Yang di-Pertuan Agong for its opinion as to the effect of any provision of the Constitution. Such advisory opinion was expressed by the court in the Government of Malaysia v Government of the State of Kelantan [1968] 1 MLJ 129, as to the meaning of the word 'borrow' under art III(2) of the Federal Constitution. Here there can be no doubt that the court's opinion is binding, although there is no provision in the Federal Constitution which says that it is so.*

In conclusion, I find myself unable to subscribe to the view that the Dewan has no authority to resolve this dispute. This means that the court has no jurisdiction over the matter, as art 71(1) clearly points to the way in which the dispute has to be settled, and by reference to the Dewan, the matter is closed. (Emphasis added.)

Hashim Yeop A Sani J (as he then was) in his judgment at pp 36–37 said:

> In the context of the Negeri Sembilan Constitution the Dewan Keadilan must surely be regarded as the custodian of the adat in Negeri Sembilan. The constitution of the members of the Dewan Keadilan would indicate this very intention. The advice of the Dewan Keadilan in the matter of adat must therefore be regarded as binding and conclusive for otherwise there would be uncertainty.

As can be seen from the above, I am of the view that the decision of the majority was that the court should decline jurisdiction where the issues are matters pertaining to the customary law of that State, in particular matters as contained in art XVI of the State Constitution where the Dewan is the best avenue to settle and decide on the issues. As such I am of the opinion that the learned counsel for the appellant is not correct when he said that the decision is only applicable to succession of the Ruler and the Ruling Chiefs.

The original art XVI of the State Constitution did not have the words 'election or succession to or removal from or vacation of office of any of the Ruling Chiefs'. The Federal Court in the *Dato Menteri Othman*'s case interpreted the words 'relating to Malay custom in any part of the State' to include succession of any of the Ruling Chiefs. The reason as can be seen from the judgment was that the succession was decided by way of Malay custom (adat). That being the case the Dewan is the best avenue to decide on it and for that reason the court should decline jurisdiction.

Now returning to the present appeal it is clear to me that the election or succession to or removal from or vacation of office of Dato' Shahbandar of Sungai Ujong should be done in accordance with the Malay custom (adat) of Negeri Sembilan in particular the Malay custom of Sungai Ujong. Any question or issue arising from that as decided by the *Dato Menteri Othman* case should be referred to the Dewan. The Dewan which has the capability to decide and determine the issue on Malay custom is the best avenue for such matter and the court should decline jurisdiction in such matter.

Even assuming for the moment that counsel for the appellant was correct in his submission, I am of the view that the majority decision of the *Dato Menteri Othman*'s case is still applicable. I have examined the Constitution and I find that the position of Dato' Shahbandar of Sungai Ujong is enshrined in the State Constitution as can be seen in Cap XV of the State Constitution. Chapter XV reads:

> Dato' Shahbandar of Sungai Ujong
>
> (1) Dato' Shahbandar Sungai Ujong shall be the person lawfully elected as head of the Waris di Ayer in accordance with the custom of the luak of Sungai Ujong.
>
> (2) Without prejudice to the prerogatives, powers and jurisdiction of Dato' Klana as Undang, and subject to the provisions of this Constitution, there shall be consultation between him and Dato' Shahbandar in all matters affecting the affairs of the luak of Sungai Ujong.

Although he is only a chieftain in Sungai Ujong, for historical reasons his status as chieftain was raised to that almost of a Ruling Chief. It falls short of a Ruling Chief for the simple reason that there cannot be two Ruling Chiefs in any domain. His status and position is protected by the State Constitution so much so art XVII of the State Constitution makes him a permanent member of the Dewan. His position is unlike the other numerous chieftains in all the districts in the State of Negeri Sembilan where no special recognition is given under the Constitution. It is to be observed that the election or succession to or removal from or vacation of office is similar to that of an Undang except it is done amongst smaller groups of people, that is Waris di Air of Sungai Ujong. In my view when there is any dispute in respect of that, the Dewan is the best avenue and the court should decline jurisdiction.

It appears to me that after the decision of the *Dato Menteri Othman*'s case, art XVI of the State Constitution was amended. Article XVI now reads as follows:

> (1) There shall be a Dewan Keadilan dan Undang to be called in English 'The Council of the Yang di-Pertuan Besar and the Ruling Chiefs' hereinafter referred to as the Dewan to advise on questions relating to Malay Custom in any part of the State including questions relating to the election or succession to or removal from or vacation of office of any of the Ruling Chiefs referred to in Article XIV or on other matters which may be referred to it by His Highness or any of the Ruling Chiefs and to exercise such functions as may be conferred upon it by this Constitution or any other written law.
>
> (2) The Menteri Besar may refer to the Dewan for its advice any question relating to Malay Custom in any part of the State including questions relating to the election or succession to or removal from or vacation of office of any of the Ruling Chiefs referred to in Article XIV.
>
> (3) *The advice of the Dewan on questions relating to Malay Custom in any part of the State including advice on any question relation to the election or succession to or removal from or vacation of office of any of the Ruling Chiefs referred to in Article XIV shall be final and shall not be challenged or called in question in any court on any ground.* (Emphasis added.)

The amendments to this article was made in 1982. On reading the present art XVI of the State Constitution, it is clear to me that the amendments were made to give effect to the majority decision in the *Dato Menteri Othman*'s case. The amendments made it clear what are the matters to be brought before the Dewan and the jurisdiction of the court has to be excluded on those matters. This has been legislated under cl (3) of art XVI. With this provision it is clear to me that any matter pertaining to the Malay custom in Negeri Sembilan is within the jurisdiction of the Dewan and the court has no jurisdiction to entertain it since its jurisdiction has been ousted by express words of the State Constitution. It is clear to me that the removal of the Dato' Shahbandar is one of the customs. As such it is clear that under the State Constitution the court has no jurisdiction to entertain the writ and the statement of claim filed by the appellant. The learned trial judge was right in striking out the appellant's writ and the statement of claim.

That is sufficient for me to dismiss the appellant's appeal. However, the learned counsel for the appellant raised the issue of natural justice in order to invite the court to exercise its jurisdiction over the matter.

In respect of this the learned counsel submitted that the issue to remove the appellant as Dato' Shahbandar of Sungai Ujong was first mooted in November 1985 but nothing came out of it. The reason for that, in my opinion, there was no Undang of Sungai Ujong and that matter could not be brought officially before the Dewan. As such the appellant remained the Dato' Shahbandar of Sungai Ujong until the appointment of the sixth respondent as the Undang of Sungai Ujong. After the appointment of the sixth respondent as the Undang of Sungai Ujong, the issue to remove the appellant as Dato' Shahbandar was revived. It appears to me that the learned counsel for the appellant attempted to connect the move in 1985 and the present. I have gone through the affidavits and I found that the decision to remove the appellant as the Dato' Shahbandar was the result of gatherings in March and July 1994. Though the move in 1985 was mentioned, the decision to remove him in March and July 1994 was not based on that at all. The decision to remove him was as a result of the appellant removing the various chieftains of Waris di Air and the letter dated 11 July 1994 written by him to His Highness. It is clear to me that the grounds for coming to the decision to remove the appellant are totally different from the one given in 1985. As such I found that there was no conspiracy as alleged by the appellant.

The present move to remove the appellant as Dato' Shahbandar began when the appellant removed some chieftains of Waris di Air. As a result of that, the elders of the Waris di Air gathered in March 1994 and reinstated those chieftains which were removed by the appellant. Apparently the appellant was invited but he chose to ignore it and did not attend the gathering despite being the head of Waris di Air. A second gathering was then held in July 1994 with the specific purpose of passing a resolution to remove the appellant as Dato' Shahbandar. The elders of Waris di Air asked the appellant to attend to answer charges of misdeeds and misbehaviours in respect of his letter dated 11 July 1994. Again the appellant refused to attend but some chieftains loyal to him attended the meeting. It is obvious to me that the appellant knew the purpose of that gathering. It is obvious to me from the affidavits that the appellant was asked to show cause why he should not be removed as the Dato' Shahbandar. There was no denial by the appellant in respect of this. At that gathering the resolution to remove the appellant as the Dato' Shahbandar was passed and adopted. A memorandum to that effect was drafted. In my view, when the appellant was invited to attend the gathering, he was given the opportunity to be heard before the elders. When he failed to do so he could not now complain that he was not given the opportunity to be heard. I found that up to that stage the elders gave the appellant the opportunity to be heard but he declined the opportunity.

It is clear to me that the memorandum of the resolution passed at the gathering in July 1994 was then presented to the sixth respondent by representatives of Waris di Air. The sixth respondent in his affidavit stated

that though he as Undang of Sungai Ujong has the power to remove the appellant as Dato' Shahbandar of Sungai Ujong, he did not act to remove the appellant as the Dato' Shahbandar. Instead he referred the memorandum to the Dewan pursuant to art XVI for its decision and a copy of it was also sent to the seventh respondent for its action.

The appellant complained that the sixth respondent did not consult him as required by art XV of the State Constitution when he decided to remove him as Dato' Shahbandar. As I have explained earlier the sixth respondent — though he has the power — did not remove the appellant. His removal was done by the elders of Waris di Air and by the Dewan when the matter was referred to it by the sixth respondent. The sixth respondent only gave his blessing to the memorandum presented to him by the heads of Waris di Air. Thus I could not see any reason why the sixth respondent should consult the appellant.

Though the elders of the Waris di Air had decided to remove the appellant as the Dato' Shahbandar, the authority to remove him lies with the Dewan. That is the reason why the decision made in 1985 by the elders of Waris di Air was of no effect and the appellant remained as Dato' Shahbandar until 1 September 1994 when the Dewan decided to remove him. It appears to me that the Dewan is the sole authority to remove or not to remove him. It is clear to me from the documents presented to the court that the Dewan decided to remove the appellant as Dato' Shahbandar of Sungai Ujong and that decision was conveyed to the seventh respondent. The seventh respondent acting on that decision stopped payment of all allowances and perks to the appellant.

It is clear to me that the Dewan is the master of its own procedure. It appears to me that there is no fixed rule and procedure when it deliberates and makes decision on any issue. For the appellant's case, it is clear to me that the appellant did make a representation in writing against the memorandum presented by the Waris di Air. The Dewan deliberated on the memorandum by the Waris di Air and the representation made by the appellant and decided that the appellant be removed as Dato' Shahbandar of Sungai Ujong. An excerpt of the minutes of the Dewan stated as follows:

> Dewan telah membincangkan secara mendalam surat bantahan bertarikh 16 Ogos 1994 daripada Hj Shahari bin Hj Hassan kepada DYMM Tuanku Pemangku Yang Di-Pertuan Besar, Negeri Sembilan mengenai pemecatannya sebagai Dato' Shahbandar Sg Ujong dan surat rayuan bertarikh 16 Ogos 1994 mengenai penahanan pemakanan kepada YAB Menteri Besar Negeri Sembilan Darul Khusus. Dewan memutuskan bahawa pemecatan Hj Shahari bin Hj Hassan sebagai Dato' Shahbandar teratur dan mengikut adat dan andika Luak Sg Ujong. Dewan juga bersetuju dengan keputusan Kerajaan Negeri berhubung dengan pemberhentian pemakanan sejak 30 September 1994.

Counsel for the appellant admitted that the appellant was at the Dewan but was not called in to participate in the deliberation. It was submitted by the learned counsel that since he was not called in to present his case, he

A was not given the opportunity of being heard. As I have said earlier the Dewan is the master of its own procedure. Since it has decided to deliberate on the representation made by the appellant in writing, it could do so. The fact remains that the appellant did make a representation in writing to the Dewan, and that to me was the opportunity of being heard.

B For the reasons stated above I could not find any merit in the appeal by the appellant. I would therefore dismiss the appeal by the appellant with costs. The decision of the learned trial judge is hereby affirmed. The deposit is to be paid to the respondents towards taxed costs.

Appeal dismissed.

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Reported by Jafisah Jaafar

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